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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 1991

Addendum

NEW ZEALAND

[29 July 1992]

GE.92-14204/0969K (E)

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

INITIAL REPORT OF NEW ZEALAND

Part I: Information of General Nature

1.1 New Zealand signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 January 1986. New Zealand ratified the Convention on 10 December 1989. On ratification, New Zealand made declarations recognising the competence of the Committee against Torture to receive and consider communications made in accordance with Articles 21 and 22 of the Convention.

1.2 In accordance with Article 19 of the Convention this report covers the period from 9 January 1990 to 8 January 1991, although more recent developments are also referred to where appropriate.

1.3 No one has been convicted of or charged with committing an act of torture in New Zealand as the term "torture" is defined in the Convention and there have been no reports of torture having taken place in New Zealand either in the period under review or before or since that time.

Summary of New Zealand's Constitutional Arrangements

1.4 The supreme legislative body in New Zealand is the New Zealand Parliament which comprises Her Majesty the Queen in Right of New Zealand (who is usually represented by the Governor-General) and the single chamber House of Representatives which has 97 members. The principal functions of Parliament are to enact laws, and supervise the administration of Government which is carried out by the Prime Minister and members of Cabinet, all of whom are elected members of the House of Representatives.

1.5 New Zealand does not have a single constitutional document. The New Zealand Constitution comprises the Constitution Act 1986 and a number of other statutory and customary law provisions which are welded together and given coherence by the operation of unwritten rules known as "conventions". The constitutional framework is erected on and maintained by the ordinary law and not through the operation of a supreme or basic law such as that found in other jurisdictions. For this reason, although New Zealand does have a Bill of Rights, which was enacted in the New Zealand Bill of Rights Act 1990, the New Zealand Bill of Rights does not operate in the same manner as Bills of Rights in some other jurisdictions. The provisions and effect of the New Zealand Bill of Rights Act are discussed below.

New Zealand's Legal System

1.6 The laws of New Zealand consist of:

(a) The common law, sometimes referred to as "judge-made law" which has been developed by the courts of England, during New Zealand's time as a British colony, and the courts of New Zealand; and

(b) Statute law enacted by the New Zealand Parliament which, since the Statute of Westminster Adoption Act 1947, is the sole authority with inherent jurisdiction to legislate for New Zealand. (A small number of British statutes and subordinate legislation which were passed prior to 1947 are also declared to be part of the laws of New Zealand by the Imperial Laws Application Act 1988.)

The Criminal Law of New Zealand

1.7 The criminal law of New Zealand has been codified by statute, principally in the Crimes Act 1961 which, in section 9, prohibits conviction for common law offences. The Crimes Act is supplemented by a number of other statutes including some of which, like the Crimes of Torture Act 1989, deal with particular categories of offences under New Zealand's criminal law.

Incorporation of Treaty Obligations in Domestic Law

1.8 International agreements do not automatically become part of the law of New Zealand simply by the process of ratification, accession or acceptance of a treaty. For an international agreement to have domestic effect either its provisions must be reflected already in New Zealand's existing domestic law or new legislation must be enacted. Before becoming a party to an international agreement, therefore, the Government reviews New Zealand's domestic law to see what additional legislation, or amendments to existing legislation, might be necessary to ensure the full and effective implementation of the agreement in New Zealand law. Such a process was undertaken prior to ratification of the Convention and resulted in the enactment of the Crimes of Torture Act 1989.

International Instruments of Wider Application

1.9 New Zealand is a party to the International Covenant on Civil and Political Rights which provides in Article 7 that "no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment". New Zealand ratified the Covenant on

26 December 1978 and accepted at that time the competence of the Human Rights Committee to receive and consider complaints made pursuant to Article 41 of the Covenant. New Zealand is also a party to the First Optional Protocol to the Covenant, and has thereby recognised the right of individual New Zealand citizens to communicate directly with the Human Rights Committee concerning alleged violations of the Covenant, and is also a party to the Second Optional Protocol concerning capital punishment. Other international human rights instruments to which New Zealand is a party are the International Covenant on Economic, Social and Cultural Rights, the Convention for the Elimination of All Forms of Racial Discrimination and the Convention for the Elimination of Discrimination Against Woman. New Zealand is also party to the Geneva Conventions of 1949 concerning the Treatment of the Wounded and Sick of the Armed Forces and the Treatment of Prisoners of War and Civilians in Time of War, and to the Additional Protocols of 1977 concerning the Treatment of Victims of Armed Conflict.

1.10 New Zealand's obligations under the international instruments referred to above are given effect through the operation of the common law and a variety of statutory instruments including:

(a) the New Zealand Bill of Rights Act 1990 (see discussion in following paragraph);

(b) the Human Rights Commission Act 1977, which establishes the Human Rights Commission and gives it the power to investigate alleged discrimination on the grounds of colour, race, ethnic or national origin, sex, marital status, religious or ethical belief in such fields as employment, professional and trade organisations, access to public places, provision of goods and services, land and accommodation, educational establishments, and advertising;

(c) the Race Relations Act 1971, which outlaws discrimination on the grounds of colour, race, or ethnic or natural origins and establishes the office of Race Relations Conciliator, who is also a member of the Human Rights Commission, to investigate alleged breaches of the Act;

(d) the Equal Pay Act 1972, which provided for the abolition of different pay rates for men and women;

(e) the Abolition of the Death Penalty Act 1989, which removed the last instances in which capital punishment could be imposed upon conviction for an offence against New Zealand law;

(f) the Geneva Conventions Act 1958, which provides for the observance of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.

New Zealand Bill of Rights Act 1990

1.11 The New Zealand Bill of Rights Act was designed to affirm, protect and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. The Act applies to acts done by the legislative, executive or judicial branches of the New Zealand Government or by any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to the law. Section 9 of the Act recognises the right of persons in New Zealand not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. As explained in Part II of this Report, there are a number of other provisions in the Bill of Rights Act which are relevant to the observance of the Convention Against Torture.

1.12 The Bill of Rights Act 1990 was passed after considerable public discussion and close scrutiny through the Parliamentary process in order to achieve an appropriate balance between ensuring the recognition of the rights and freedoms set out in the Bill of Rights and the continued operation of New Zealand's constitutional arrangements, in particular the principle of the sovereignty of Parliament, under which there is no supreme law. Accordingly, Parliament did not provide that the Bill of Rights could be used to challenge the validity of other legislation. The Act provides that the rights and freedoms contained in the Bill of Rights "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" and also provides that whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other. On the other hand, the Act also provides that a court shall not hold a provision of another enactment to be invalid or ineffective by reason only that that provision is inconsistent with the Bill of Rights.

READEX FICHE

The Crimes of Torture Act 1989

1.13 Torture has long been effectively prohibited through the operation of New Zealand's criminal and civil law. The Crimes Act 1961 contains a number of offences relating to assault and injury to the person which prohibit acts which amount to torture. Similar offences were contained in the predecessor legislation to that Act. Civil law also provides for actions for assault, battery, false imprisonment and trespass which could be pursued by a victim of torture. When considering ratification of the Convention, however, it was recognised that the crime of torture had a special character. For this reason it was considered that the inclusion of the crime of torture as a specific offence was desirable to give full effect to the Convention. Accordingly, the Crimes of Torture Act 1989 was enacted before New Zealand ratified the Convention. A full discussion of the provisions of the Crimes of Torture Act is contained in Part II of this report.

Judicial and Administrative Bodies with Jurisdiction over Offences

1.14 There are two courts in New Zealand with original jurisdiction to try offences against the criminal law; the High Court and the District Court. Serious offences such as those proscribed by the Crimes of Torture Act 1989 must be tried before a judge of the High Court. High Court judges are appointed by the Governor General under the Judicature Act 1908.

1.15 As a general rule, persons accused of serious crimes are tried before a judge of the High Court with a jury of 12 independent persons. Although in some circumstances an accused may elect to be tried before a judge without a jury, trial before a judge and jury is mandatory for persons charged with offences punishable by life imprisonment or by imprisonment for 14 years or more.

1.16 A person convicted and sentenced in the High Court for a criminal offence may appeal to the Court of Appeal, either against conviction or sentence or both. The Court of Appeal comprises judges of the High Court appointed to the Court of Appeal by the Governor General.

1.17 As described in Part II of this Report, allegations of neglect or misconduct, including breaches of the disciplinary provisions of the Police Regulations 1959, can be heard by an internal Police inquiry and by the Police Complaints Authority, a special tribunal established by the Police Complaints Authority Act 1988. A more general power of inquiry

into the actions of public officials is conferred on Ombudsmen pursuant to the Ombudsmen Act 1975. Under that Act an Ombudsman has the power to investigate complaints made by any person about a decision or recommendation of Government agencies, local government authorities, state-owned enterprises or statutory bodies relating to a matter of administration and affecting any person in his or her personal capacity.

1.18 In the period under review and up until the time this Report was written, no prosecutions have been brought under the Crimes of Torture Act 1989. In the period since the establishment of the Police Complaints Authority on 1 April 1989 to 30 June 1991, the Authority has received 491 complaints asserting an unlawful use of force by Police officers. Of those complaints, the Authority has accepted 462 complaints for investigation. Of the complaints investigated, the Authority has upheld 54 complaints in whole or in part. As a result of investigations by the Authority, 2 prosecutions for assault have been brought by the Commissioner of Police against individual Police officers. One of those prosecutions has resulted in a conviction. In addition, one individual complainant to the Authority has successfully brought a private prosecution against an individual Police officer. None of the actions complained of can be said to amount to an act of torture as that term is defined in Article 1 of the Convention or in the Crimes of Torture Act 1989.

Remedies Available to Victims of Torture

1.19 Victims of torture can make a complaint to the Police who have principal responsibility for investigating and prosecuting offences against the criminal law of New Zealand. If the alleged perpetrator of an act of torture is a member of the Police, a complaint can be made to the Police Complaints Authority. Alternatively, a victim can ask an investigation by an Ombudsman who has jurisdiction to investigate complaints about the actions of public officials.

1.20 Section 5 of the Crimes of Torture Act 1989 provides that where any person is convicted of an offence under the Act the Attorney General shall consider whether it would be appropriate in all the circumstances for the Government to pay compensation to the victim or, if the victim has died as a result of the offence, to the victim's family. There is also scope under section 22 of the Criminal Justice Act 1985 for the Court to order the perpetrator of an act of torture to pay compensation under a sentence of reparation. In addition, a victim of torture could bring a civil action against the person who

committed the act of torture and seek exemplary or punitive damages for any personal injury suffered and, if applicable in the circumstances, damages for false imprisonment. A victim of torture suffering personal injury from an act of torture would be entitled to compensation for that injury under the Accident Compensation Act 1982. Such compensation can include the cost of medical care. Specific rehabilitation programmes for victims of torture have not been set in place because no incidents of torture have taken place in New Zealand.

Practical Difficulties in Implementing the Convention

1.21 As noted in paragraph 1.3 above, no acts of torture have taken place in New Zealand. Accordingly, the New Zealand authorities have not experienced any practical difficulties in implementing the Convention in New Zealand. As discussed in paragraphs 3.5 and 3.6 of this Report, although some questions were raised concerning the consistency with Article 3 of actions taken during the 1991 Gulf War, the New Zealand authorities are satisfied that the terms of the Convention were properly upheld at that time and will continue to be so upheld in the future.

Part II: Information in Relation to each of the Articles in Part I of the Convention

ARTICLE 2

Measures to Prevent Torture

New Zealand Bill of Rights Act 1990

2.1 Two provisions of the New Zealand Bill of Rights Act 1990 are directed towards the prevention of torture in New Zealand:

Section 9: Everyone has the right not to be subjected to torture, or to cruel, degrading, or disproportionately severe treatment or punishment.

Section 10: Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

Two other provisions of the Bill of Rights Act are also relevant to the prevention of torture:

Section 21: Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.

Section 22: Everyone has the right not to be arbitrarily arrested or detained.

The Act requires public officials to ensure the recognition of these rights, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free or democratic society or which are prescribed by statute.

Crimes of Torture Act 1989

2.2 The Crimes of Torture Act 1989 has specific and directly enforceable provisions to prohibit acts of torture and was enacted to give effect to the Convention in New Zealand law. Section 3 of the Act provides that any person who is a public official or is acting in an official capacity, or any person who acts at the instigation or with the consent of a public official or a person acting in an official capacity, who commits an act of torture is liable to imprisonment for a term not exceeding 14 years.

2.3 Section 2 defines "act of torture" as meaning:

Any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

(a) For such purposes as:

(i) Obtaining from that person or some other person information or a confession; or

(ii) Punishing that person for any act or omission for which that person or some other person is responsible or is suspected of being responsible; or

(iii) Intimidating or coercing that person or some other person; or

(b) For any reason based on discrimination of any kind;

but does not include any act or omission arising only from, or inherent in, or incidental to, any lawful sanctions that are not inconsistent with the Articles of the International Covenant on Civil and Political Rights.

Section 2 defines "public official" as meaning:

(a) Any person in the service of Her Majesty in right of New Zealand, including:

(i) A member of any of the Armed Forces of New Zealand; and

(ii) A judicial officer and a law enforcement officer within the meaning of Part VI of the Crimes Act 1961; and

(iii) An officer within the meaning of the Penal Institutions Act 1954; and

(iv) A member and an employee of any local authority or public body; and

(b) Any person who may exercise any power, pursuant to any law in force in a foreign state, that would be exercised in New Zealand by any person described in paragraph (a) of this definition.

2.4 As is the case with a number of other offences under New Zealand law, the Act provides that no proceedings for the trial and punishment of a person charged with torture under the Act shall be instituted without the consent of the Attorney General, who is the chief legal officer of New Zealand. This provision ensures that no one is tried for such a serious offence, in respect of which New Zealand owes international obligations, until the Attorney General has had an opportunity to consider the matter. The provision does not, however, prevent the arrest and detention of a person who is suspected of having committed an act of torture, pending the consent of the Attorney General.

Crimes Act 1961

2.5 The Crimes Act 1961 provides for a number of offences for actions which, depending on the circumstances, could constitute torture. The offences range from common assault (s196) to assault with intent to injure (s193), wounding with intent (s188), manslaughter (s171) and murder (ss167-168). A person suspected of having committed an act of torture could, depending on the circumstances, be charged with such offences, either in addition to or instead of being charged under the Crimes of Torture Act.

2.6 In addition to the provisions of the Crimes Act, which apply to all persons in New Zealand, and those of the Crimes of Torture Act, which apply to all public officials and government employees, there are special provisions which apply to the New Zealand Police, prison officers and members of the New Zealand Armed Forces.

New Zealand Police

2.7 Members of the New Zealand Police are subject to the Police Act 1958, General Instructions issued by the Commissioner of Police pursuant to that Act, and the

Police Regulations 1959. In addition, the provisions of the Crimes Act 1961 relating to the use of force in arresting and detaining offenders apply to members of the Police, and Police conduct can be investigated under the Police Complaints Authority Act 1988.

2.8 The head of the New Zealand Police Force is the Commissioner of Police appointed pursuant to the Police Act 1958. Pursuant to section 30 of the Act, which gives the Commissioner power to issue general instructions for the regulation and discipline of members of the Police, the Commissioner has issued a detailed set of instructions for Police officers to follow when undertaking searches of prisoners, and which specify conditions in which prisoners must be kept during their time in Police custody. The Instructions also provide specific guidance on the circumstances in which force may be used in arresting and detaining offenders and require a written report to be provided wherever the force used is more than minor. Special guidance is provided with respect to the use of restraining holds; a "choker" or trachea hold is strictly forbidden. Members of the Police are also subject to the disciplinary provisions of the Police Regulations 1959. Regulation 46 sets out 62 disciplinary offences for which Police officers can be held guilty of misconduct or neglect of duties. Included among them is Regulation 46(9) - treating any person or prisoner cruelly, harshly, or with unnecessary violence.

2.9 There are procedures for both internal and external investigation of allegations of Police misconduct. Where any misconduct or neglect of duty is alleged against a sworn member of the Police, an internal inquiry can be conducted under the Police Act and the Police Regulations, which allow for the establishment of a tribunal to hear the charges, including the calling of evidence and cross-examination, and to report to the Commissioner of Police and the Minister of Police.

2.10 An external enquiry can be held pursuant to Police Complaints Authority Act 1988. Under the Act any complaint alleging any misconduct or neglect of duty by a member of the Police may be reported to the Police Complaints Authority or to any member of the Police, to any Ombudsman or to the Registrar or Deputy Registrar of any District Court. Any of the above persons, other than the Complaints Authority itself, receiving such a complaint must forward the complaint to the Authority. In addition, the Commissioner of Police has issued a set of General Instructions providing specific direction and guidance to members of the Police on how to respond to and handle complaints made under the Police Complaints Authority Act.

2.11 Under section 17 of the Police Complaints Authority Act, the Authority has a range of options open to it upon receiving a complaint. It may choose either:

- to investigate the complaint itself (whether or not the Police have commenced a Police investigation), or

  to defer action until receiving a report from the Commissioner of Police on such a Police investigation, or

- to oversee a Police investigation of the complaint, or

- to decide to take no action on the complaint in circumstances where the complainant has had knowledge of the matters under complaint for more than 12 months before the complaint was made, or, if in the opinion of the Authority, the subject matter of the complaint is trivial or frivolous or vexatious or not made in good faith.

Other circumstances in which the Authority may choose to take no action are where the person alleged to have been aggrieved by the Police does not wish action to be taken, or where the identity of the complainant is unknown and would thus impede substantially the investigation of the complaint, or where there is already an adequate remedy or right of appeal which it would be reasonable for the person alleged to have been aggrieved to exercise.

Penal Institutions

2.12 The conduct of officers and employees of penal institutions in New Zealand, including any prison or corrective training institution or Police jail established pursuant to the Penal Institutions Act 1954, is subject to the Penal Institutions Act and the Penal Institutions Regulations 1961. The Act and the Regulations stipulate the conditions and standards which must be observed in the treatment of prisoners and conform with the United Nations Standard Minimum Rules for the Treatment of Prisoners. The Regulations provide detailed guidance to prison officers on the care and control of prison inmates. Regulation 64 provides that no prison officer shall use force in dealing with any inmate except in self defence or in the defence of another person, or in the case of an escape or attempted escape or active or passive physical resistance to a lawful order. The Regulation also provides that any officer who uses force in circumstances permitted by the Regulations shall use no more force than is

necessary in the circumstances and shall report the incident to the prison superintendent as soon as possible. In addition, the Penal Institutions Regulations set out the requirements to be followed in searching inmates and in dealing with complaints from inmates.

2.13 Penal institutions are subject to inspection at any time by Inspectors appointed pursuant to the Penal Institutions Act and also by Visiting Justices, which include all District Court Judges and Visiting Justices appointed by the Minister of Justice. Visiting Justices can, at their discretion, interview inmates, examine the treatment and conduct of inmates, and hear any complaints made by any inmate. They may also enquire into abuses or alleged abuses within the institution or in connection with it. Inmates may also complain to an Ombudsman under the Ombudsmen Act 1975 which, among other matters, gives an Ombudsman the power to investigate complaints about officers and employees of the Department of Justice which administers New Zealand's penal institutions. Procedures under which inmates can request to see the Superintendent of the institution, or an Inspector or Visiting Justice, or can lodge a complaint with the Ombudsman are set out in Section E of the Penal Institutions General Orders.

Armed Forces

2.14 Members of the New Zealand Armed Forces are subject to the Armed Forces Discipline Act 1971, which provides for the administration of justice within the Armed Forces. Although the primary emphasis of the Act is on service offences, section 74 of the Act provides jurisdiction to courts-marshall to deal with offences by Armed Forces personnel against the civil law of New Zealand. Accordingly, a member of the Armed Forces can be tried by court-marshall for an offence against the Crimes of Torture Act 1989 or for offences against the Crimes Act 1961.

2.15 Legal effect is given in New Zealand to the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 by the Geneva Conventions Act 1958. Under that Act, any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a breach of any of the Conventions or of the First Protocol, such as the torture or inhuman treatment of a person covered by the Conventions or the Protocol, commits an offence for which he or she may be tried under New Zealand law.

Non-Waiver of Provisions

2.16 New Zealand law makes no provision for waiver of the provisions of the Crimes of Torture Act 1989 or of the Crimes Act 1961, nor can exceptional circumstances such as state or threat of war, internal and political instability or other public emergency be invoked as defences for any offence referred to in the above paragraphs.

Superior Orders

2.17 Superior orders are no defence to an offence under the Crimes of Torture Act 1989. The Armed Forces Discipline Act 1971 (section 38), the Police Regulations 1959 (Regulation 46(1)) and the Penal Institutions Regulations 1961 (Regulation 32) require obedience to "any lawful order" given by a superior officer. Similarly, section 47 of the Crimes Act 1961 provides that members of the New Zealand Armed Forces who are bound to obey the lawful command of a superior officer are justified in obeying such a command given by such a superior officer unless the command is manifestly unlawful. Since a command to commit an act of torture would be contrary to the Crimes of Torture Act 1989, any such command would be inherently unlawful and contrary to the above provisions. Accordingly the defence of superior orders cannot be availed in any such circumstance. Moreover, the Crimes of Torture Act specifically provides that it is itself an offence for any person to commit an act of torture at the instigation of a public official or anyone acting in an official capacity.

ARTICLE 3

Non-Expulsion, Return or Extradition of Persons likely to Suffer Torture

Refugee Procedures

3.1 New Zealand's fulfilment of its obligations under this article are in large measure performed through its implementation of the United Nations Convention relating to the Status of Refugees of 1951 and its 1967 Protocol. New Zealand is a party to the Convention and the Protocol and is therefore obliged not to expel or return ("refouler") a person with a well-founded fear of persecution by reason of his or her race, religion, nationality, membership of a particular social group, or political opinion.

3.2 The procedures used for the consideration of persons claiming refugee status changed during the period under review. For most of the period, all

applications for refugee status or asylum were considered by the Interdepartmental Committee on Refugees. The committee comprised representatives of the Ministry of External Relations and Trade, the New Zealand Immigration Service and, depending on the circumstances, the New Zealand Police and the Prime Minister's Department. A representative of the United Nations High Commissioner for Refugees also attended most committee hearings and took part in its deliberations. The committee interviewed all applicants, who could be accompanied by legal counsel or other friend or advisor, and, if desired, an interpreter, and made recommendations to the Minister of External Relations and Trade and the Minister of Immigration who decided jointly whether the applicant should be granted refugee status or, if appropriate in the circumstances, residence on humanitarian grounds.

3.3 The procedures for considering refugee applications were changed as from 1 January 1991 because of the large and progressive increase in the number of applications which had resulted in significant delays in the hearing and determination of applications. Under the new procedures, applicants for refugee status are interviewed in the first instance by a member of the New Zealand Immigration Service, who has the power to decide whether the applicant should be granted refugee status or, if appropriate, residence on humanitarian grounds. If an application for refugee status is declined, the applicant has an automatic right of appeal to the Refugee Status Appeal Authority. The Authority is chaired by a retired District Court judge and comprises, in addition, representatives of the Ministry of External Relations and Trade and the United Nations High Commissioner for Refugees, and two independent lawyers. A quorum of any three members is required for hearings of the Authority. An appellant has the right to make written submissions and to appear in person before the Authority, and can be represented by counsel. The Immigration Service also has the right to make oral submissions to the Authority which has the power to overturn decisions by the initial interviewing officer from the Immigration Service if, in the opinion of the Authority, the applicant should be granted refugee status in accordance with the 1951 Convention.

3.4 Persons who claim refugee status on arrival in New Zealand are normally given 30 day visitor permits in the first instance to enable them to lodge an application for determination. Further permits can be granted if necessary to ensure that a final determination is reached on whether a person is required to leave the country.

3.5 An issue which was considered carefully during the preparation of the Report is the difference in the scope of a State's obligations under the Refugees Convention and those owed under the Convention Against Torture. Article 33 of the Refugees Convention permits a State to expel a person or to refuse to admit a person to its territory, notwithstanding the fact that the person may face a threat on account of his or her race, religion, nationality, membership of a particular social group, or political opinion, where there are reasonable grounds for regarding the person as a danger to the security of the State. By contrast, as a consequence of Article 2(2) of the Convention Against Torture it would appear that no similar national security exception is permissible with respect to the obligation in Article 3 not to expel or return a person where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. As a result of this difference in scope between the Conventions, the situation could arise under which a State could be obliged not to expel a person from its territory because there were substantial grounds for believing that such a person could be subjected to an act of torture, notwithstanding the fact that in accordance with the Refugees Convention there were valid national security grounds for refusing to grant such a person refugee status. The New Zealand authorities are alert to the need to ensure that the refugee assessment procedures take into account the apparent wider scope of the Convention Against Torture.

3.6 In practical terms, in the period under review no persons were refused entry to New Zealand after having made claims to refugee status. In one instance some confusion arose over two persons who arrived in New Zealand without documentation and were refused entry. Those persons were, however, admitted one week later to New Zealand having made applications for refugee status. Shortly after the period under review, ie during the period of the Gulf War, a number of persons who arrived at a New Zealand port of entry with false documentation or without documentation were, in accordance with Provisional Procedures adopted for the period of the Gulf crisis, refused entry and detained pending determination of their security status. Twenty such persons were subsequently removed from New Zealand because they were not given security clearance. Some of these persons were escorted to their country of nationality. The New Zealand authorities consider that the steps taken were justified in the circumstances and that the requirements of the Convention were met.

Extradition/Surrender of Offenders

3.7 Extradition from New Zealand is regulated by the Fugitive Offenders Act 1881, which applies to the surrender of offenders to countries which, like New Zealand, are members of the Commonwealth, and the Extradition Act 1965, which regulates extradition to non-Commonwealth countries. The Crimes of Torture Act 1989 made a number of important amendments to both the Fugitive Offenders Act and the Extradition Act to ensure the implementation in New Zealand of the extradition provisions of Article 3:

(a) Sections 6 and 7 of the Act amended the Extradition Act 1965 and the Fugitive Offenders Act 1881 to provide that no person shall be extradited to a foreign country under the Extradition Act or transferred to a Commonwealth country under the Fugitive Offenders Act if it appears to the Minister of Justice that there are substantial grounds for believing that that person would be in danger of being subjected there to an act of torture. In addition, the Extradition Act 1965 was also amended to provide that if the Minister of Justice is of the opinion that there are substantial grounds for believing that an offender whose extradition has been requested would be in danger, if the request were granted, of being subjected to an act of torture, then the Minister shall refuse to notify a District Court judge of the request, in which case the extradition may not proceed. The Minister may also at the same time order that the offender be discharged from custody. Similarly, the Fugitive Offenders Act 1881 was amended to provide that no person shall be returned from New Zealand to a Commonwealth country without the consent of the Minister of Justice if it appears to any court before which the accused has been brought, or to any court or judge on an application for a writ of habeas corpus, that there are substantial grounds for believing that the accused would be in danger of being subjected there to an act of torture.

(b) Section 10 of the Crimes of Torture Act amended the Extradition Act 1965 and the Fugitive Offenders Act 1881 to provide that no person whose surrender is sought in respect of any act or omission that amounts to an offence under the Crimes of Torture Act shall be surrendered from New Zealand to another country if it appears to the Minister of Justice or to the court before which that person is brought, or to any court or judge on an application for a writ of habeas corpus, either:

(i) that the surrender of the accused, although purporting to have been sought in respect of such an offence, was sought for the purpose of prosecuting or punishing the accused on account of his or her race, ethnic origin, religion, nationality, or political opinion; or

(ii) that if the accused is surrendered, he or she may be prejudiced at his or her trial, or punished, detained, or restricted in his or her personal liberty, by reason of his or her race, ethnic origin, religion, nationality, or political opinion.

(c) Section 10 of the Crimes of Torture Act also provides that the Minister of Justice may decline to order the surrender of a person from New Zealand to another Commonwealth country under the Fugitive Offenders Act 1881 in respect of any act or omission that amounts to an offence under the Crimes of Torture Act if it appears to the Minister that in respect of the act or omission, the person has been sentenced to death or is liable to be so sentenced in the country to which his or her surrender is sought. Similarly, the section provides that no judge shall, without the consent of the Minister of Justice, order the surrender of a person from New Zealand to another Commonwealth country in respect of any act or omission that amounts to an offence under the Crimes of Torture Act if it appears to the judge that, in respect of the act or omission, the person has been sentenced to death or is liable to be so sentenced by the country to which his or her surrender is sought.

ARTICLE 4

Offences of Torture

4.1 Section 3(1) of the Crimes of Torture Act 1989 provides that it is an offence for a public official or someone acting in an official capacity, or for a person acting at the instigation or with the consent of a public official or someone acting in an official capacity, whether in or outside New Zealand,

(a) to commit an act of torture; or

(b) to do or omit an act for the purpose of aiding any person to commit an act of torture; or

(c) to abet any person in the commission of an act of torture; or

(d) to incite, counsel or procure any person to commit an act of torture.

Section 3(2) of the Act provides that it is a criminal offence for a public official or someone acting in an official capacity, or for a person acting at the instigation or with the consent of a public official or someone acting in an official capacity:

(a) to attempt to commit an act of torture; or

(b) to conspire with any other person to commit an act of torture or

(c) to be an accessory after the fact to an act of torture.

These provisions ensure that all offences referred to in Article 4 of the Convention are offences under the laws of New Zealand.

Penalties

4.2 Any person convicted of an offence against section 3(1) of the Crimes of Torture Act is liable to a term of imprisonment not exceeding 14 years. A prison term of 14 years is amongst the most severe penalties provided under New Zealand law. The only more severe penalty is life imprisonment, which is mandatory upon conviction for murder or treason. Persons convicted of an offence against section 3(2) of the Crimes of Torture Act are liable to imprisonment for a term not exceeding 10 years. If criminal charges were laid under the Crimes Act 1961, a person convicted of an offence such as wounding with intent would be liable to imprisonment for a term not exceeding 14 years or, in the cases of other offences, to penalties ranging from 1 year in the case of common assault to 10 years in the case of injury with intent. A person convicted of manslaughter is liable to imprisonment for life. As noted above, life imprisonment is the mandatory penalty for murder.

ARTICLE 5

Jurisdiction Over Offences

5.1 Section 4 of the Crimes of Torture Act 1989 provides that no proceedings for an offence under the Act shall be brought unless:

(a) The person to be charged is a New Zealand citizen; or

(b) The person to be charged is present in New Zealand; or

(c) The act or omission constituting the offence charged is alleged to have occurred in New Zealand or on board a ship or an aircraft registered in New Zealand.

As a consequence of this provision, New Zealand complies fully with the requirements of Article 5(1)(a) and (b) and Article 5(2).

5.2 When enacting the Crimes of Torture Act it was decided that no attempt should be made to take jurisdiction on the basis of the nationality of the victim. Such an approach would be contrary to New Zealand's established legal practice under which jurisdiction is taken on the basis of where the offence is committed or in some cases, the nationality of the person committing the offence, but not the nationality of the victim of the offence.

ARTICLE 6

Arrest and Detention of Alleged Offenders

6.1 A person who is present in New Zealand and is suspected of having committed an act of torture can be charged with an offence under the Crimes of Torture Act 1989 and may be arrested without warrant, or a warrant for his or her arrest may be issued and executed. Section 315 of the Crimes Act 1961 provides that any Police constable may arrest and take into custody without a warrant any person whom the constable has good cause to suspect of having committed an offence punishable by imprisonment. Accordingly, the New Zealand Police have authority to arrest and to remand, either in custody or on bail, a person suspected of having committed an act of torture. Both the Fugitive Offenders Act 1881 and the Extradition Act 1965 contain provisions under which a warrant may be issued for the arrest and detention of a person suspected of having committed an act of torture, where it is intended that that person should be returned to the country in which the offence was committed or is deemed to have been committed.

6.2 As offences under the Crimes of Torture Act are punishable by terms of imprisonment greater than 3 years, a person charged with an offence under the Act is not bailable as of right. A decision to grant bail is at the discretion of the court and would be taken in the light of the circumstances of the case, including, in particular, the likelihood of the

alleged offender appearing at a trial for the alleged offence, or at proceedings pursuant to the Fugitive Offenders Act or the Extradition Act. It would be unusual for a person charged with a serious offence such as torture to be granted bail.

6.3 Section 316(5) of the Crimes Act provides that every person who is arrested on a charge of an offence such as an offence against the Crimes of Torture Act must be brought before a court as soon as possible to be dealt with according to law. In practice, this means that a person who is arrested on any particular day will in normal circumstances appear in court the following morning to be remanded in custody or granted bail. If a person were to be detained without being charged, a writ of habeas corpus could be brought before the court so that the reason for the detention could be examined. If the detention could not be justified, the court would order the release of the person concerned. An action for false imprisonment could also be brought against anyone wrongfully confining another person.

6.4 The Extradition Act 1965 similarly provides that every person arrested under a warrant issued under that Act must be brought before the court as soon as possible and a hearing conducted in accordance with the provisions of the Summary Proceedings Act 1957. The Extradition Act also requires, however, that the hearing of the case shall not proceed until the court has received from the Minister of Justice a written notice stating that he has received a request for the surrender of the offender. If no such notice is received within a reasonable time, or within the time specified in the relevant extradition treaty, the court is required to discharge the offender, although the court has a discretion to extend the time within which notice may be received. Similarly, the Fugitive Offenders Act 1881 provides that a person must be brought before a court when apprehended and may not be held in custody for an unreasonable time. Where a person is apprehended and committed to prison under the Fugitive Offenders Act, that person must be informed that he or she will not be surrendered to the country seeking the transfer until the expiration of 15 days and that he or she has the right to apply for a writ of habeas corpus.

6.5 It is standard procedure in all cases of extradition for the Police to maintain close liaison with the Ministry of External Relations and Trade, which is responsible for the conduct of New Zealand's external relations and which acts as liaison with diplomatic and consular representatives accredited to New Zealand. In accordance with those procedures, the Ministry would be responsible for communicating with

foreign States in the circumstances envisaged in Article 6(4) of the Convention and in accordance with Article 36 of the Vienna Convention on Consular Relations. In addition, section 10(1)(b)(ii) of the Crimes of Torture Act 1989 provides that a person whose surrender is sought by another country in respect of any act or omission that amounts to a crime under that Act shall not be surrendered if it appears to the Minister of Justice, or to the court before which that person is brought, or to any court or judge on an application for a writ of habeas corpus, that the position of the person may be prejudiced because communication with that person by the appropriate authorities of the country that is entitled in international law to exercise rights of protection in respect of that person cannot be effected.

ARTICLE 7

Prosecution for Offences

7.1 Sections 3 and 4 of the Crimes of Torture Act 1989 ensure that the New Zealand authorities have jurisdiction to prosecute anyone suspected of having committed an offence referred to in Article 4 of the Convention in the cases set out in Article 5. As noted in paragraph 5.1 above, the New Zealand courts have jurisdiction to try a person for such an offence where the person to be charged is a New Zealand citizen, or is present in New Zealand, or the act or omission constituting the offence is alleged to have occurred in New Zealand or on board a ship or aircraft registered in New Zealand. Accordingly, in any such case, a prosecution can be brought in New Zealand against such a person if it is decided that the alleged offender should not be extradited. In addition, section 11 of the Crimes of Torture Act provides that a person shall not be surrendered from New Zealand to another country in respect of an act or omission that amounts to a crime under the Act if proceedings have been brought in New Zealand, or if the Attorney-General certifies that the case is being or is about to be considered to determine whether or not proceedings should be brought in New Zealand, against that person in respect of that act or omission.

Standards of Evidence

7.2 As the offences referred to in Article 4 of the Convention are crimes under New Zealand law by virtue of the Crimes of Torture Act 1989, decisions by the New Zealand authorities as to whether to prosecute someone suspected of having committed such an offence

will be taken on the same basis as decisions made with respect to the prosecution of persons suspected of having committed other serious offences against New Zealand's criminal law. The standards of evidence and proof required for prosecution and conviction for any offence against the Crimes of Torture Act - whether jurisdiction for such prosecution is established by virtue of the fact that the act or omission constituting the offence took place in New Zealand or on board a New Zealand ship or aircraft, or by virtue of the fact that the alleged offender is present in New Zealand - will be the same standards as are applied in all prosecutions for crimes under New Zealand law.

Fair Treatment for Persons Prosecuted

7.3 Any person prosecuted for any of the offences referred to in Article 4 is accorded the same treatment throughout all stages of the proceedings as are other persons accused of serious offences against New Zealand law. All persons charged with criminal offences in New Zealand are guaranteed the rights and freedoms provided for in Article 14 of the International Covenant on Civil and Political Rights. It is a fundamental principle of New Zealand's criminal law that an accused person is presumed to be innocent and this presumption may only be rebutted by proof beyond "a reasonable doubt" of the guilt of the person concerned. Except in exceptional circumstances, criminal proceedings are conducted in open court to which the public have free access. An accused person has a right to counsel and, depending on the circumstances, to legal aid and is assured of a trial before an independent judiciary. These rights are reflected in the following provisions of the New Zealand Bill of Rights Act 1990:

Section 23:

(1) Everyone who is arrested or who is detained under any enactment-

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is-

(a) Arrested; or

(b) Detained under any enactment-
for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

Section 24: Everyone who is charged with an offence-

(1) Shall be informed promptly and in detail of the nature and cause of the charge; and

(2) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(3) Shall have the right to consult and instruct a lawyer; and

(4) Shall have the right to adequate time and facilities to prepare a defence; and

(5) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(6) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(7) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

Section 25: Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(1) The right to a fair and public hearing by an independent and impartial court:

(2) The right to be tried without undue delay:

(3) The right to be presumed innocent until proved guilty according to law:

(4) The right not to be compelled to be a witness or to confess guilt:

(5) The right to be present at the trial and to present a defence:

(6) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

(7) The right, if convicted of an offence in respect of which the penalty has been varied between commission of the offence and sentencing, to the benefit of the lesser penalty:

(8) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

(9) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

ARTICLE 8

Extradition of Persons Suspected of Acts of Torture

8.1 Section 8 of the Crimes of Torture Act 1989 provides that all offences under the Act shall, if not already described in the Treaty, be deemed to be offences described in any extradition treaty concluded before the commencement of the section between New Zealand and any foreign country that is a party to the Convention. In accordance, however, with the spirit of section 26 of the New Zealand Bill of Rights Act 1990 (which provides that no one shall be liable to conviction of any offence which did not constitute an offence by such person under the law of New Zealand at the time it occurred), section 8 of the Crimes of Torture Act also provides that no person shall be liable for extradition on the basis of acts or omissions that took place before the commencement of the Act. Section 6(3) of the Crimes of Torture Act provides that the crimes of committing or being a party to an act of torture or of attempting or conspiring to commit, or being an accessory after the fact to, an act of torture shall be extraditable offences for the purposes of the Extradition Act

1965. Persons alleged, therefore, to have committed any offence against the Crimes of Torture Act can be extradited to any country which is a party to the Convention and with which New Zealand has an extradition treaty. In addition, the Fugitive Offenders Act 1881, which applies to the exchange of fugitives among Commonwealth countries and which does not rely on the existence of extradition treaties between New Zealand and other Commonwealth countries, applies to any offence punishable by imprisonment for a term of 12 months or more. Accordingly, persons alleged to have committed any offence under the Crimes of Torture Act can be transferred to Commonwealth countries on the basis of the Fugitive Offenders Act.

8.2 As noted above, the transfer of offenders to other Commonwealth countries under the Fugitive Offenders Act 1881 does not depend on the existence of an extradition treaty. Since all of the offences referred to in Article 4 of the Convention are punishable under the Crimes of Torture Act by terms of imprisonment exceeding 12 months, any person suspected of having committed such an offence may be transferred to another Commonwealth country pursuant to the Fugitive Offenders Act. Extradition to non-Commonwealth countries, however, is regulated by the Extradition Act 1965 which, in section 3, requires that there be an extradition treaty for the surrender of offenders concluded between New Zealand and another foreign country before the Act can apply to the extradition of suspected offenders to that foreign country. In addition, the Act must be specifically applied to a particular foreign country by the Governor General before it will apply. Accordingly, it would be difficult in the context of these legislative provisions to regard the Convention Against Torture as itself constituting sufficient legal basis for extraditing a suspected offender to a non-Commonwealth country with which New Zealand does not have an extradition treaty.

8.3 As noted in paragraph 8.2, persons suspected of having committed offences under the Crimes of Torture Act may be transferred to other Commonwealth countries in accordance with the Fugitive Offenders Act because all such offences are punishable in New Zealand law by terms of imprisonment exceeding 12 months.

8.4 Section 9 of the Crimes of Torture Act 1989 provides that where the surrender of a person is sought under either the Extradition Act 1965 or the Fugitive Offenders Act 1881 in respect of an act or omission which amounts to crime under the Crimes of Torture Act, and for which the person whose surrender is sought would be tried and punished in the country

seeking surrender, being a country that is a party to the Convention, then that act or omission is deemed to have been committed within the jurisdiction of that country, notwithstanding that it was committed outside the jurisdiction of the country. Accordingly, this section ensures that there is the necessary jurisdictional base for another Party to the Convention to seek extradition from New Zealand of a person suspected of having committed an offence referred to in Article 4 of the Convention, provided that that other Party has concluded an extradition treaty with New Zealand or that other Party is a Commonwealth country.

ARTICLE 9

Mutual Assistance in Proceedings

9.1 A draft bill on mutual assistance in criminal matters has recently been introduced into the New Zealand Parliament. If enacted, as is expected, this legislation will provide a legislative basis for New Zealand to enter into arrangements with other Parties from which New Zealand can request assistance and to which New Zealand can provide assistance specifically in relation to criminal matters, including offences referred to in Article 4 of the Convention. In the meantime, New Zealand legislation already provides sufficient basis for evidence to be supplied for use in proceedings being brought in the jurisdiction of other Parties. Sections 48A to 48E of the Evidence Act 1908 set out the procedures for evidence to be taken in New Zealand for use in overseas proceedings, including criminal proceedings (not being criminal proceedings of a political character). Sections 37 to 43 of the Evidence Amendment (No. 2) Act 1980 also provide procedures under which New Zealand courts, at the request of a corresponding court in any country prescribed by the Minister of Justice, can take evidence in New Zealand in relation to proceedings before the corresponding court. Where the Minister has prescribed any such country, the provisions of the Evidence Amendment (No. 2) Act 1980 supercede those of sections 48A to 48E of the Evidence Act 1908.

9.2 In addition to the formal arrangements for the taking of evidence in New Zealand for proceedings in another country, there are informal arrangements between the New Zealand Police and its counterparts overseas by which co-operation can be extended in the prosecution of persons suspected of having committed offences referred to in Article 4 of the Convention. The New Zealand Police belong to Interpol (the International Criminal Police Organisation) and readily exchange information and provide assistance

to other police member organisations in relation to criminal investigations and proceedings.

ARTICLE 10

Education and Training

10.1 The legislative restraints, rules and regulations applicable to the New Zealand Police, officers at penal institutions and members of the New Zealand Armed Forces have been described in paragraphs 2.7 to 2.14 above. Civilian and military personnel who may be involved in the custody, interrogation or treatment of individuals detained in accordance with the laws of New Zealand receive instruction and information concerning the prohibition against torture during their training.

Police

10.2 Police recruits receive, as part of their training programme material, information on and copies of the New Zealand Bill of Rights Act 1990 which includes the prohibition on torture. Similarly, the New Zealand Police Gazette Legal Notes incorporate material on the Bill of Rights Act and the prohibition on torture. More generally, the prohibition against torture is covered by the guidelines relating to the use of force, treatment of prisoners, interviewing of persons and observance of the provisions in the Bill of Rights Act which are included in the Police General Instructions issued by the Commissioner of Police. The Police "Values Statement" contained in the Corporate Plan adopted by the Police Department stresses the need to ensure respect for individual rights and freedoms. It is intended that new training material for Police recruits will include even greater detail on the respect for human rights and individual freedoms, particularly in the sections dealing with arrest and the interviewing of suspects.

Penal Institutions

10.3 As noted in paragraph 2.12 above, the United Nations Minimum Standard Rules for the Treatment of Prisoners are reflected in the Penal Institutions Act 1954 and the Penal Institutions Regulations 1961, which stipulate the conditions and standards that must be observed in the treatment of prisoners. The prohibition against torture as contained in the Crimes of Torture Act is to be specifically included in the training module being developed for the instruction of prison officers. The prison officer training manuals are at present being revised and will include specific reference to the prohibition of acts of torture.

Armed Forces

10.4 The service Police of the New Zealand Armed Forces are instructed about the need to respect human rights and individual liberties when dealing with detained persons. Members of the Armed Forces involved in intelligence work receive instruction on procedures to be followed in dealing with and interrogating prisoners of war. These instructions include specific guidance on what constitutes acceptable conduct and are designed to ensure respect for human rights of persons in custody. The texts of the Geneva Conventions of 1949 and the Additional Protocols are reproduced in the Manual of Armed Forces Law, and members of the Armed Forces receive instruction in the law of armed conflict.

Children and Young Persons

10.5 The Department of Social Welfare exercises responsibility over children and young persons held in secure care in accordance with the Children, Young Persons, and Their Families Act 1989. Section 13 of that Act sets out the principles to be followed in the care and protection of children and young persons. The first principle is that "children and young persons must be protected from harm, their rights upheld, and their welfare promoted". Sections 15 to 17 of the Act make special provision for reporting and investigating allegations of harm or likely harm or ill treatment or neglect of a child or young person.

10.6 A separate part of the Children, Young Persons and Their Families Act deals with children and young persons who have committed, or are suspected of having committed, offences against New Zealand law. Section 208 sets out the principles of "Youth Justice" which are to guide any Court or any person exercising functions under the relevant provisions of the Act, including:

- The principle that any sanctions imposed on a child or young person who commits an offence should:

  (i) take the form most likely to maintain and promote the development of the child or young person within his or her family, whanau, hapu and family group; and

  (ii) take the least restrictive form that is appropriate in the circumstances:

and

- The principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission of an offence by that child or young person.

10.7 The Department of Social Welfare has rewritten its Residential Services Code of Practice, and the Children and Young Persons (Residential Care) Regulations 1986 which apply to the care of children and young persons who are detained in the 4 residences run by the Department, are being revised. Three of the 4 residences run by the Department are designated Youth Justice residences and are specifically for the containment of young people who commit serious offences. The other residence is solely for children and young persons in need of care and protection. Placement in either a Youth Justice or Care and Protection residence is viewed by the Department as an option of last resort to be used where there is no other viable community-based alternative. The revised Code of Practice for Residential Care Services requires that children and young persons are treated as persons of individual worth and dignity and requires staff to avoid any practices which could degrade, dehumanise, abuse, harm or humiliate a person. Physical restraint may be used only when absolutely necessary in such circumstances as self defence or in the defence of another person, to protect the child or young person from injury, or to ensure the containment of the child or young person in secure care. Ongoing in-service training is made available to all residential social workers involved in the custodial detention of children and young persons pursuant to the Children, Young Persons, and Their Families Act.

Immigration

10.8 The training material of the New Zealand Immigration Service is directed at ensuring fair and respectful treatment is accorded to all persons with which the Service deals. While the Service can be responsible for bringing about the arrest and detention of persons suspected of having committed offences against New Zealand's immigration laws, the Service itself does not have the powers of arrest and detention. It relies on the Police for the performance of such functions. Border Control Officers at ports of entry into New Zealand receive specific instruction on New Zealand's obligations under the Refugees Convention and guidance on how to treat persons arriving at New Zealand who may wish to apply for refugee status. Primary emphasis is given to the obligation not to return persons to countries where they may be persecuted and to the obligation to admit such persons in order to have their status

determined. Similarly, representatives of the Immigration Service who conduct interviews of applicants for refugee status receive specific instruction and guidance on how to conduct interviews in order to ensure that applicants are given a full opportunity to have their case determined in accordance with the Refugees Convention.

Medical Professionals

10.9 The training and education of persons involved in the medical profession places primary emphasis on the duty of such persons to minimise suffering and to respect the rights and dignity of patients. This duty is reinforced by the ethical codes adopted by the various branches of the profession such as the New Zealand Medical Association and the New Zealand Nurses Association which emphasise the duty of health care professionals to respect the human rights of persons in their care and not to participate in or condone acts such as torture. In addition, the Mental Health Act 1969 makes it an offence for any person having the oversight, care or control of any mentally disordered person to ill-treat or wilfully neglect any such mentally disordered person. The penalty for conviction of such an offence is a substantial monetary fine and/or imprisonment for a term not exceeding two years.

ARTICLE 11

Review of Rules, Procedures and Custody Arrangements

11.1 The New Zealand Police regularly review their procedures relating to the treatment of persons being interviewed; and persons in custody and subject to arrest, detention or imprisonment, in order to ensure that the procedures are properly implemented and that amendments are made in the light of any deficiencies that become apparent. Similarly, the procedures for military investigations and detention by service Police under the Armed Forces Discipline Act 1971 are kept under regular review through the Directorate of Legal Services for the New Zealand Defence Force.

11.2 The Department of Justice, which is responsible for the administration of New Zealand's prisons, reviews periodically the implementation of the Penal Institutions Regulations. Prisons are visited regularly by prison Inspectors or Visiting Justices with whom inmates may have interviews in accordance with the Penal Institutions Regulations 1961 and the Penal Institutions General Orders.

11.3 The placement of children or young persons in detention is subject to daily internal review by the staff of the Residential Care Centre. In addition, the Childrens Young Persons and Their Families Act 1989 provides for a system of periodic review by the courts of any decision to place a child or young person in secure care. The Act also provides that it is a function of the Commissioner for Children appointed under the Act to monitor and assess the policies and practices of the Social Welfare Department or of any other person, body or organisation performing any function under the Act. The Commissioner also has the function of encouraging the development, within the Social Welfare Department, of policies to promote the welfare of children and young persons.

11.4 The care of persons who are held involuntarily because it has been found that they are mentally disordered is regulated by the Mental Health Act 1969. Section 55 of that Act requires the superintendent of a psychiatric hospital or licensed institution to keep the case of every committed patient in the hospital under review and to consider as often as practicable whether the patient should cease to be a committed patient. Section 56 of the Act directs that provision should be made for psychiatric hospitals to be visited at least once in every 3 months by an Inspector or an Official Visitor who may inspect any part of the facility and see any person detained there. Inspectors, who are appointed from the legal profession, may inquire into any breaches of the Act or the Mental Health Regulations and into any breach of duty by any officer or employee of the hospital, and into such other matters as the Inspector deems fit to be inquired into respecting any patients, or the management of the hospital. The Mental Health Act has been reviewed and new legislation has been prepared to take its place. This legislation, contained in the Mental Health (Compulsory Assessment and Treatment) Bill, is currently being considered by Parliament. If enacted, as is expected, the new legislation will provide more detailed safeguards to protect the rights of those committed for non-consensual treatment.

11.5 The New Zealand Immigration Service reviews periodically its rules and procedures for dealing with persons who claim refugee status or asylum or who are reluctant to leave New Zealand upon the expiry of their permits. Such reviews are considered sufficient and flexible enough to ensure the necessary adjustments to changing situations.

ARTICLE 12

Investigation of Offences

Police

12.1 Primary responsibility for investigating alleged criminal offences, including offences under the Crimes of Torture Act 1989, rests with the New Zealand Police. By virtue of the Police Oath and the Police Regulations 1959, every member of the Police is under a general obligation to investigate all suspected offences promptly and impartially whenever there are reasonable grounds to believe that an offence has been committed. Accordingly, if it is alleged that an act of torture has been committed in New Zealand, in normal circumstances the investigation would be undertaken by the Police.

12.2 In the case of alleged Police misconduct, an internal inquiry can be conducted under the Police Act 1958 and the Police Regulations. As described in paragraph 2.10 above, an independent investigation into alleged Police misconduct can also be undertaken by the Police Complaints Authority under the Police Complaints Authority Act 1988.

Penal Institutions and Psychiatric Hospitals

12.3 Under the Penal Institutions Act 1954, Inspectors and Visiting Justices have the power to hear complaints about the treatment of inmates and to enquire into all abuses or alleged abuses within an institution and to report thereon to the Secretary for Justice. As noted in paragraph 11.4 above, Inspectors appointed under the Mental Health Act 1969 have general powers of inquiry. These include the power to inquire into alleged abuses against patients. Under the Ombudsmen Act 1975, Ombudsmen have the power to investigate complaints made about Government officials, including the staff of penal institutions and of psychiatric hospitals.

Armed Forces

12.4 If it were alleged that a member of the New Zealand Armed Forces had committed an offence under the Crimes of Torture Act the commanding officer of that person would be required under section 103 of the Armed Forces Discipline Act 1971 to cause the allegation either to be investigated or to be referred to the appropriate civil authority for investigation.

Children and Young Persons

12.5 The Commissioner for Children appointed under the Children, Young Persons and their Families Act 1989 has a number of functions which he or she can exercise to inquire into the alleged abuses against children or young persons. These include the function to investigate any act done under the Act in respect of any child or young person, the function to assess the practices of any person or organisation exercising functions, duties or powers under the Act, and the function to inquire generally into any practice or procedure relating to the welfare of children and young persons. The Commissioner also has the power to report, at the Commissioner's own initiative or on the request of the Minister, to the Minister of Social Welfare on any matter relating to the administration of the Act.

Other Government Officials

12.6 As noted in paragraph 1.17 above, the Ombudsmen Act 1975 gives Ombudsmen jurisdiction to investigate complaints about the actions of Government officials, local government authorities, state-owned enterprises and certain statutory bodies. The Act gives an Ombudsman the power, following an investigation, to refer a complaint to the Police for further consideration. In addition, persons employed in government departments can be disciplined under the departmental code of conduct adopted in accordance with the State Sector Act 1988.

ARTICLE 13

Examination of Complaints

Police

13.1 In the normal course of events, if it were alleged that a serious crime such as an offence under the Crimes of Torture Act had been committed, a complaint would be laid with the Police who would investigate to see whether there were reasonable grounds for believing that such an offence had taken place. If as a result of such investigation the Police were satisfied that there were such reasonable grounds and were able to identify and locate the alleged offender, the offender would be arrested and charged.

13.2 As described in paragraph 2.9 above, the Police Act and Regulations set out procedures for inquiring into alleged misconduct or neglect of duty by a sworn member of the Police. The Commissioner may suspend the member of Police pending the outcome of an inquiry or until that person has been sentenced or

otherwise dealt with by a court. As described in paragraph 2.10, an alternative procedure for the investigation of allegations of Police misconduct is available under the Police Complaints Authority Act 1988.

Penal Institutions and Psychiatric Hospitals

13.3 As noted in paragraphs 12.13 above, the Penal Institutions Act 1954 and the General Orders issued thereunder guarantee the right of an inmate in New Zealand's penal institutions to an interview with an Inspector or Visiting Justice and to lodge complaints with them about treatment received in the institution. Visiting Justices and Inspectors have a right to enquire into all abuses or alleged abuses within the institution and to report thereon to the Secretary for Justice. The Secretary would refer serious allegations of mistreatment of prisoners by prison officers to the Police for investigation and prosecution. Similarly, Inspectors appointed under the Mental Health Act 1969 have the power to investigate alleged actions against patients in psychiatric hospitals. Persons in penal institutions and psychiatric hospitals have a right to complain to an Ombudsman under the Ombudsmen Act 1975. Under section 16 of the Ombudsmen Act, correspondence to the Ombudsman is confidential and may not be opened or censored.

Armed Forces

13.4 As noted in paragraph 12.4, the Armed Forces Discipline Act 1971 requires commanding officers of persons alleged to have committed an offence either to cause the allegation to be investigated or to refer the matter to the appropriate civil authority such as the Police for investigation.

Children and Young Persons

13.5 The Children and Young Persons (Residential Care) Regulations 1986 require the principal of an institution in which children and young persons are held in secure care to ensure that every child or young person in the institution has explained to him or her from time to time the procedures in the institution for dealing with complaints and the means by which a complaint may be lodged. Each residence prominently displays the procedures that children and young persons can follow if they have a grievance or complaint. In addition, each resident is provided with a handbook which includes information on the actions residents can take if they have a grievance. A member of the local community has access to each residence at any time of the day or night, in addition to regular monthly visits. Meetings with

children and young persons in residence are carried out without staff being present, and the visiting community person can meet with them both as a group and individually. Complaints can be referred to the Commissioner for Children who has a general power to inquire into the welfare of children and young persons. The proposed new regulations will provide even more stringent and detailed grievance procedures. The schedule to the proposed draft regulations will describe the minimum provisions to be included in grievance procedures and will require that the member of staff to whom a child or young person makes a complaint shall be obliged to assist the child or young person to write down the details of the complaint and to forthwith deliver the complaint to the director of the residence. The director of the residence will be required to investigate the complaint or to arrange for its investigation.

Protection from Ill-Treatment and Intimidation

13.6 Complainants and witnesses in all criminal proceedings are protected against ill- treatment or intimidation by the Crimes Act 1961, section 117 of which makes it an offence to dissuade or attempt to dissuade any person, by threats, bribes, or other corrupt means, from giving evidence in any cause or matter, civil or criminal, or to wilfully attempt in any other way to obstruct, prevent, pervert, or defeat the course of justice. In the case of complaints to the Police Complaints Authority, section 25 of the Police Complaints Authority Act 1988 provides that every person shall have the same privileges in relation to the giving of information to the Authority, the answering of questions put by the Authority, and the production of documents to the Authority, as witnesses have in court. In addition, section 32 of the Act requires the Authority to maintain secrecy in respect of all matters that come to its knowledge in the exercise of its functions, and not to communicate any such matter to any person, except for the purpose of carrying out its functions under the Act.

ARTICLE 14

Redress for Victims of Torture

14.1 In New Zealand, persons who suffer personal injury, regardless of how the injury occurred, can obtain compensation under the Accident Compensation Act 1982. That Act establishes a universal system for compensating all persons who suffer personal injury by accident. The Act removed the right of individuals suffering personal injury to lodge a

civil claim for ordinary damages in respect of such an injury. Compensation in respect of ordinary damages has now been taken over by the State through the Accident Compensation Corporation. The Act did not remove, however, the right of an individual to sue for exemplary or punitive damages arising out of an act or omission causing personal injury. Accordingly, a victim of torture would have the right to make a claim against the perpetrator of the act or omission for punitive or exemplary damages in addition to whatever compensation was received by way of the Accident Compensation Act. In addition, and depending on the circumstances, a victim of torture could also lodge a claim for false imprisonment and seek damages by way of compensation. At the time this report was written a number of changes to the Accident Compensation Act were being considered by the Government. Any changes which are made which might bear on the implementation of the Convention will be included in New Zealand's next periodic report.

14.2 Separately from any civil action that a victim of torture may institute against the perpetrator of an act of torture, a court which is sentencing an offender who has been convicted of an offence such as torture, may, if satisfied that another person has suffered emotional harm through or by means of the offence, sentence the offender to make reparation to the victim. Such a sentence, provision for which is made in section 22 of the Criminal Justice Act 1985, is at the discretion of the court which also has the power to require the preparation of a report on such matters as the nature of the emotional harm suffered, the means of the offender, the nature and extent of the offender's financial obligations, and the frequency and magnitude of any payments that should be required under a sentence to make reparation.

14.3 In so far as Article 14 imposes an obligation on a State to compensate and to treat victims of torture separately from other persons who have suffered harm, when ratifying the Convention New Zealand entered the following reservation to Article 14:

- The Government of New Zealand reserves the right to award compensation to torture victims referred to in Article 14 of the Convention only at the discretion of the Attorney-General of New Zealand.

- New Zealand made its reservation to Article 14 to ensure consistency with its longstanding position that it is advisable to deal with compensation to victims of crime, or to persons who suffer as a result of a miscarriage of justice, on an ex gratia basis so that every

case can be considered entirely on its own merits. For the same reason, New Zealand made a similar reservation to Article 14(6) of the International Covenant on Civil and Political Rights concerning the payment of compensation to persons who suffer as a result of a miscarriage of justice.

14.4 Effect is given to the Article 14 of the Convention Against Torture, as qualified by the reservation in section 5 of the Crimes of Torture Act 1989. Section 5 requires that where any person has been convicted of an act of torture, the Attorney-General must consider whether it would be appropriate in all the circumstances for the Crown to pay compensation to the person against whom the offence was committed or (if that person has died as a result of the offence) to that person's family. The section also ensures that this provision shall not limit or affect any other rights to compensation that a victim of torture may have under any other enactment.

ARTICLE 15

Inadmissibility of Statements Obtained by Torture

15.1 It is a long settled principle of New Zealand common law that evidence is only admissible in legal proceedings if it is shown to have been given voluntarily. That rule is qualified to an extent by section 20 of the Evidence Act 1908 which gives a judge the discretion to admit in evidence in any criminal proceeding a confession made by an accused, notwithstanding the fact that a promise or threat or any other inducement was held out to or exercised upon the person confessing, where the judge is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made. That qualification, however, does not apply where the inducement was of the nature of an exercise of violence or force or other form of compulsion. Accordingly, any statement which was made as a result of an act of torture would not be admissible in criminal proceedings against the person making the statement. Further protection is provided by the Judges Rules which establish the procedures to be followed by the Police when questioning persons suspected of having committed an offence.

15.2 As noted in paragraph 13.6 above, section 117 of the Crimes Act 1961 makes it an offence to attempt to influence a witness by threats, bribes or other corrupt means or to attempt in any other way to obstruct or defeat the course of justice. Clearly this section would prohibit any action in the nature of an act of torture against a witness.

ARTICLE 16

Prevention of Other Acts of Cruel, Inhuman or Degrading Treatment or Punishment

16.1 Acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 of the Convention or section 2 of the Crimes of Torture Act are punishable in New Zealand under the general criminal law. In particular, the crimes of assault, aggravated assault, aggravated wounding or injury, injury by unlawful, injuring with intent (sections 188-196 of the Crimes Act), manslaughter and murder (sections 167-168 of the Crimes Act 1961), as well as the crimes of kidnapping and abduction (sections 208-210 of the Crimes Act 1961) would apply to such acts depending on the circumstances of the particular case. Any person, regardless of whether he or she is a public official or is acting at the instigation of a public official, can be prosecuted for offences under the above sections. In addition, Police officers are subject to the Police Regulations 1959, Regulation 46(9) of which provides that it is an offence for any member of the police to treat any person or prisoner cruelly, harshly, or with unnecessary violence. Prison officers are subject to the provisions of the Penal Institutions Regulations 1961, which require that officers shall not use force in dealing with any inmate except in self defence or in defence of another person. The procedures described in this report as available for the investigation of alleged acts of torture are equally available for the investigation of other acts of cruel, inhuman or degrading treatment or punishment.

16.2 The comments made under Articles 10, 11, 12 and 13 apply equally in respect of inhuman or degrading acts other than acts of torture.

TOKELAU

When New Zealand ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1989, this ratification extended to Tokelau.

Tokelau consists of three remote atolls lying in the middle of the Pacific near the Equator and having a total land area of 12.2 square kilometres and a population of 1,578 (1991 census). Tokelau is a non-self governing territory of New Zealand and its people are New Zealand citizens.

Nevertheless, Tokelau has a separate legal and judicial system. New Zealand statute law is not applicable in Tokelau, except as otherwise expressly provided. Since the early 1980s substantive efforts have been made to build up for Tokelau a body of its own law based, where applicable, on local custom.

The Tokelau Crimes Regulations 1975 presently cover relevant offences. They provide for a number of offences which range from culpable homicide, including murder and manslaughter (R133, 134, 135, and 139) to grievous bodily harm (R151) and assault (R157). These Regulations have been under revision since 1987. They are presently in the final stages of drafting, and will expand upon the current regulations in a number of respects.

Generally speaking Tokelau is completely free of any serious crime. There are no prisons and, although there are six serving police officers, their functions have more to do with clerical work and administration than law enforcement. Cases of arrest and detention of any kind are virtually unknown. Nevertheless it is intended, once the new Crimes Regulations have been promulgated, to issue a handbook setting out standards for the conduct of judicial and law enforcement officers and to include in that specific references to the prohibition against torture.

Annexes*

LIST OF ANNEXES TO NEW ZEALAND'S INITIAL REPORT ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

A. STATUTES

Crimes of Torture Act 1989
New Zealand Bill of Rights Act 1990
Constitution Act 1986
Imperial Laws Application Act 1988
Human Rights Commission Act 1977
Race Relations Act 1971
Equal Pay Act 1971
Abolition of Death Penalty Act 1989
Geneva Conventions Act 1958
Police Complaints Authority Act 1988
Crimes Act 1961
Criminal Justice Act 1985
Summary Proceedings Act 1975
Ombudsmen Act 1975
Accident Compensation Act 1982
Accident Rehabilitation and Compensation Act 1992
Police Act 1958
Penal Institutions Act 1954
Armed Forces Discipline Act 1971
Immigration Act 1987
Fugitive Offenders Act 1881
Extradition Act 1965
Evidence Act 1908
Evidence Amendment (No. 2) Act 1980
Children, Young Persons and Their Families Act 1989
Mental Health Act 1969
Mental Health Compulsory Assessment and Treatment Act 1992
State Sector Act 1988

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* These documents, as received in English from the Government of New Zealand, are available for consultation in the files of the United Nations Centre for Human Rights.

B. **REGULATIONS**

Police Regulations 1959

Penal Institutions Regulations 1961

Children and Young Persons (Residential Care) Regulations 1986

C. **ADMINISTRATIVE PROCEDURES ETC**

Police General Instructions on:

- searches of prisoners
- the use of force in arresting/detaining persons
- complaints under the Police Complaints Authority Act

Police Gazette Legal Notes

Police Values Statement in Police Corporate Plan

Judge's Rules

Penal Institutions General Orders, Section E. (Justice Department)

Immigration Service Guidelines for Interviewing Applicants for Refugee Status

Revised Code of Practice for Residential Care Services (Social Welfare Department)

D. **DRAFT LEGISLATION**

Mutual Assistance in Criminal Matters Bill